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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY L. DURANT, Defendant and Appellant.	A151338 (Alameda County Super. Ct. No. 177781)

Anthony L. Durant appeals from a judgment of conviction and sentence imposed after a jury found him guilty of second degree murder and unlawful possession of a firearm, and further found that he personally used and intentionally discharged a firearm in the commission of the murder. (Pen. Code, §§ 187; 29820, subd. (b); 12022.53, subds. (b), (d).)[1] Durant contends (1) the court should have instructed the jury on heat of passion manslaughter as an alternative to malice murder; (2) the court should have instructed sua sponte on self-defense and defense of others; (3) an instruction on accomplice testimony was required; (4) the court erred in allowing the prosecutor to question a witness, including a query about "rumors" and the word "on the street," regarding a prior dispute between Durant and his victim as a possible motive for the murder; (5) the prosecutor committed misconduct in opening statement and witness examinations; (6) his defense attorney provided ineffective assistance of counsel by failing to object to the prosecutorial misconduct; (7) the case should be remanded for

[1] Except where otherwise indicated, all statutory references are to the Penal Code.

resentencing in light of Senate Bill No. 620, so the court may consider whether to strike a sentence enhancement for personal use of firearm under section 12022.53, subdivision (b); (8) the case should be remanded to allow Durant to make a record for a youth offender parole hearing under section 3051; and (9) his sentence for unlawful firearm possession should be stayed pursuant to section 654.

We will remand for the trial court to decide whether to exercise its discretion to strike the sentence enhancement imposed under section 12022.53, to allow Durant to make a record for a future youth offender parole hearing, and to stay the sentence as to Durant's conviction for unlawful firearm possession. In all other respects, the judgment is affirmed.

I. FACTS AND PROCEDURAL HISTORY

Durant was charged with the murder of Christian Sheppard (§ 187, subd. (a)) and unlawful possession of a firearm by a former juvenile ward (§ 29820, subd. (b)). As to the murder count, the Information alleged that Durant personally used a firearm (§ 12022.53, subd. (b)) and personally and intentionally discharged a firearm and caused great bodily injury and death (§ 12022.53, subd. (d)).

The matter proceeded to a jury trial. Essentially, the prosecutor's theory was that Durant shot Sheppard to death at a dice game, perhaps due to a prior dispute; Durant urged that Sheppard was killed by an unknown masked robber who got away.

A. Prosecution Evidence

1. Sheppard is Shot at a Dice Game

On October 6, 2015, Durant, Sheppard, Kenneth Joubert, and Antuan Mason were at the Rosewood Manor Apartments (Rosewood Apartments) on 1615 Russell Street in Berkeley, where Mason lived. They decided to play dice at an apartment complex next door at 1611 Russell Street. For the next few hours, about seven men, including Durant and Sheppard, played dice.

a. Joubert and Mason

Joubert testified that, after "a few rolls," he and Mason left the dice game and walked three or four blocks to meet with the mother of Joubert's child and give her some

money. After stopping at a liquor store, they were returning to the dice game when Joubert heard a gunshot, followed by a rapid-fire sequence of approximately 16 more gunshots. Joubert and Mason ran to the apartment complex to see what was happening. When they reached the location of the dice game, Joubert saw Sheppard's body on the ground and "blood everywhere;" it was clear he had been shot. Joubert had not observed anyone wearing a mask.

Mason generally corroborated Joubert's account, although his recollection differed as to the amount of time they spent at the dice game and the order in which they went to the liquor store and met Joubert's girlfriend. He and Joubert walked back towards the dice game after being away for roughly 20 minutes. Mason heard gunshots, ran to the scene, and saw Sheppard's body; he did not see any masked gunman. In an interview after the shooting, Mason told officers that he was not comfortable around Durant, whom he described as "aggressive." However, he had not sensed any animosity or tension between Durant and Sheppard at the game.

b. Perez

Beatriz Perez lived at 1611 Russell Street, where the dice game was held. On the night of the shooting, she arrived home around 6:15 p.m. and saw Durant, Sheppard, and three other men playing dice against the side of her apartment building. At one point, she left her apartment, walked past the game, and saw Durant and Sheppard, but did not "think" she saw anyone else. After returning to her apartment, Perez heard Durant talking outside in an angry tone. There was about a minute of silence, followed by gunshots. Perez did not hear anyone say anything about a robbery or "give me your stuff."[2]

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[2] At trial, Perez testified that Durant was the only person she heard talking; she heard other voices at a distance, but she could not identify them. Perez had previously told Officer Donovan Edwards that Durant and Sheppard were arguing, but she could not hear about what, and gunshots ended the argument. In an interview with Sergeant Peter Hong, Perez had said she recognized Sheppard's and Durant's voices and Durant's was the loudest, "very loud, angry, using profanity." As to the time that elapsed before the shooting, Perez testified at trial that there was about a minute of silence between hearing

When the gunshots stopped, Perez looked out her window and saw Durant run past, wearing a black "hoodie" and dark blue pants. She heard people screaming from the neighboring Rosewood Apartments; some were screaming Durant's name.

Perez had been concerned about talking to the police because it was discouraged in her neighborhood and she was afraid she might be harmed. Nonetheless, when police arrived at the scene, Perez told them that she had seen Durant and Sheppard playing dice and observed Durant running away after the shooting. Perez showed the officers photographs of Durant from her cell phone.

c. Magdalena

Sierra-Maria Magdalena's residence overlooked the apartment complex where Sheppard was shot. On the day of the shooting, she returned home from work around 6:45 or 7:00 p.m. As she sat by her window some time later, she heard two gunshots outside, a brief pause, and then a rapid sequence of gunshots. She had not heard any shouting or yelling before the gunfire. Magdalena looked into the courtyard and saw a young Black male with dreadlocks look around and then run toward the neighboring Rosewood Apartments. Magdalena saw another person lying on the ground, but did not see anyone else in the courtyard. At 8:32 p.m., Magdalena called 911 and reported her observations.

The next day, police showed Magdalena a photograph of Durant, and she was "90 percent sure" that he was the man she had seen fleeing after the shooting.

2. Officers Respond to the Scene

Berkeley Police Officer Steven Fleming responded to the shooting scene and tended to Sheppard. Sheppard was transported to Highland Hospital, where he was declared dead. The cause of death was multiple gunshot wounds: counting both entry and exit wounds, the autopsy revealed 21 wounds to Sheppard's left eye, jaw, chest, back, stomach, thigh, and calf.

Durant's voice and hearing the gunshots, but she acknowledged in her preliminary hearing testimony that the gunshots followed Durant's voice immediately.

Officers found 16 shell casings at the scene of the dice game, as well as dollar bills, dice, marijuana, marijuana containers, Joubert's cell phone, and Mason's cell phone.[3] Officers also found $120 in Sheppard's jeans.

3. A Gun is Discovered Nearby

Jason Wolf lived in the rear unit of 1611 Julia Street, approximately "four doors down" from Durant's residence. Wolf's backyard abutted a YMCA, which neighbored 1611 Russell Street, where the dice game was held. Wolf heard gunshots and, about a minute later, thought he heard his gate open. He called the police, who arrived within seven minutes, searched Wolf's property, and found no one.

After the police left, Wolf looked around his backyard and discovered a gun behind a chair. He called the police to report his find at 10:06 p.m.

Berkeley Police Officer Jumaane Jones went to Wolf's house and collected the firearm, which he identified as a nine-millimeter Smith & Wesson SDV9. Jones saw that the slide on the gun was in a "lock rear position," meaning that all of the rounds in the magazine had been expended. The magazine had a capacity of 15 rounds, so that, with one bullet in the chamber, the gun could fire a total of 16 shots without reloading.

Alameda County firearms examiner Cary Wong later analyzed the 16 shell casings found at the shooting scene and determined they were fired from the semiautomatic pistol recovered in Wolf's backyard. DNA and fingerprint analysis of the gun was inconclusive.

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[3] At trial, Joubert explained that he had left his phone at the dice game with his friend Sheppard when he went to see his child's mother, because the phone was charging on Sheppard's portable charger. He did not retrieve his phone after the shots were fired, because he did not want to be the last person at a crime scene. Detective Hong confirmed that Joubert told him the same thing during his investigation. Mason told Hong that he dropped his phone after he saw Sheppard's body, as he was running through a hole in the fence between 1611 Russell Street, site of the dice game, and the Rosewood Apartments, where he lived.

4. Durant is Found With Bloody Bills and Gunshot Residue

Berkeley Police Officer Cesar Melero responded to the shooting scene and obtained a description of the shooter: a Black male with dreadlocks, six feet tall, wearing a red, white, and blue shirt, blue jeans, and a black hat. As Melero drove around the neighborhood looking for the suspect, he received a call identifying Durant as the suspect and reporting his address as 1625 Julia Street. There, Melero observed someone matching the suspect's description; Durant was thereafter apprehended by a team of officers.

From Durant's pants pocket, officers recovered several crumpled bills that appeared to have fresh blood on them. Testing confirmed that the blood was Sheppard's, with a one-in-136 quadrillion chance that a random person would have that DNA profile.

Durant's hands were swabbed for gunshot residue at 12:40 in the morning following the shooting. Criminalist Ann Keeler tested the swabs and found 14 particles of gunshot residue in the sample from Durant's right hand, and seven particles from the left-hand sample. She opined that Durant was in the area of the firearm when it was fired or had handled it during or after the time it was fired.

5. Subsequent Investigation

Surveillance footage from a YMCA on Russell Street, less than a minute run from the shooting scene, showed a man running by at 8:33 p.m. (a minute after Magdalena called 911). The man was running toward Wolf's yard, where the gun was recovered, in the direction of Durant's residence. The man's face was not visible, but from his body type, his clothing (a red, white and dark-color jersey), and his dreadlocks, Officer Hong believed it to be Durant.

6. Alleged Threats and Witness Tampering

At trial, three prosecution witnesses expressed a reluctance to testify. Mason said that he was afraid of testifying (but denied being afraid of Durant). Joubert had previously told the prosecutor that he was having problems in the neighborhood and did not want to testify, but he asserted at trial that those matters were unrelated to Durant's case. When asked if he had received threats, Joubert responded, "I plead the fifth" and "I

don't want to talk about it," but eventually said no. When the prosecutor asked Perez if she had been threatened after testifying at the preliminary hearing, she too said no. However, she testified that she moved from the apartment complex because she "didn't feel safe," and in her community cooperating with the police could be dangerous.

The prosecution also introduced evidence of witness tampering. Stephanie Moore testified that she lived in the Rosewood Apartments and had attended high school with Durant. After Durant was arrested for the charged crimes, Moore visited him in jail several times and spoke to him frequently on the telephone. In September 2016, she received a letter from Durant asking her to "holla at" Mason and have him tell the prosecutor "we got robbed and ran when we seen the [guy] with the gun and dropped his phone." Durant's letter also asked Moore to "[p]ull [Mason] to the side if you have to or when y'all by y'all self," and further instructed: "Don't do it in front of nobody, but tell him I need him to come home since the DA is putting the ball in his hand." Moore said that she did not comply with Durant's request.

B. Defense Evidence

Durant testified at trial, insisting that Sheppard was shot by a masked robber during the dice game.

According to Durant, he was with Sheppard, Mason, and some other males when a robber in a black mask walked up holding a gun. Mason and the other men ran away, leaving Sheppard and Durant with the robber. The robber announced, "You niggas don't move. Give me everything. Tear it off or I'm going to shoot this motherfucker up." Durant emptied his pockets of about $70, put his hands up, and said: "That's all I got." Sheppard asked, "Why are you robbing us, dude?" and added, "I know who you are." The robber responded, "Give me everything before I start shooting." Sheppard replied: "I'm not giving you nothing. I know who you are. Why are you robbing us?" Durant warned Sheppard: "Dude, don't argue with this man; he has a gun. Give it up. All this stuff here is little. We can get it all back." But Sheppard tried to stand up, the robber fired several shots, and Sheppard fell. Durant then "tussled" with the robber and tried to grab the gun, which kept firing. He and the robber fell to the ground. Durant jumped up

and ran, but as he turned the corner of the building, he decided to return to the scene. There he saw that Sheppard was "shot up everywhere" and assumed he was dead. Durant did not call 911 because he did not know where the shooter was (despite his decision to return to the scene). Durant saw that the robber had left Durant's money on the ground, so Durant grabbed it and ran to his house. Durant never called 911. Not only had the robber left Durant's money behind, he did not take cell phones or jewelry from the scene.

Confronted on cross-examination with the fact that he was telling a different story than the one he told police on the night of the shooting, Durant admitted that he had lied to the officers when he said he was not involved in the dice game or present during the shooting. He also lied to the officers about the clothes he wore that day.

Durant described his relationship with Sheppard as "No problems. We was cool. Everything always fun and games." He denied having any big arguments with Sheppard before the shooting.

Amiria Hogan testified that she lived at the Rosewood Apartments at 1615 Russell Street. At 8:30 p.m. on October 6, 2015, she heard shots. Seconds later, she looked out her window and saw three to five "boys" running and someone on the ground. She called the Berkeley police. At trial, she was confronted with evidence that Berkeley Police dispatch had received a call at 8:35 p.m. from "Amiria," stating she saw *two* Black males running from the area. Asked about her reference to "two [B]lack males," Hogan said she meant at least two.

The defense stipulated that Durant had a 2007 juvenile adjudication for robbery for purposes of the unlawful possession charge.

C. Jury Verdict and Sentence

The jury convicted Durant of second degree murder and unlawful possession of a firearm, and found true the allegations that he personally used a firearm (§ 12022.53, subd. (b)) and personally and intentionally discharged a firearm and caused Sheppard great bodily injury and death (§ 12022.53, subd. (d)).

The court sentenced Durant to 40 years to life in state prison, comprised of 15 years to life for second degree murder, 25 years to life for an enhancement under section

12022.53, subdivision (b), and a two-year concurrent term for unlawful firearm possession.

This appeal followed.

II. DISCUSSION

As mentioned, Durant testified at trial that Sheppard was killed by a masked robber whom no other witness saw and who fled without taking the cash and valuables left at the scene. In this appeal, however, he contends the court should have instructed the jury on heat of passion voluntary manslaughter, self-defense, and defense of others, and further contends other instructional error, evidentiary error, and prosecutorial misconduct to which he never objected at trial. We address his contentions in turn.

A. Instruction on Voluntary Manslaughter

Durant contends his second degree murder conviction must be reversed because the jury was not instructed on manslaughter as an option to malice murder. Specifically, he argues, the court erred by failing to instruct on a heat of passion theory.

1. The Court's Instructions

At a discussion of proposed jury instructions on January 25, 2017, the court indicated that it would give CALCRIM No. 500 (general principles), No. 520 (express and implied malice murder), and No. 521 (first and second degree) on the murder count. Defense counsel moved to dismiss the first degree murder charge based on Durant's testimony that an unknown man shot Sheppard while robbing the dice game. This motion was denied. Other than contesting whether there was sufficient evidence of premeditation and deliberation for first degree murder, defense counsel did not challenge the instructions proposed by the court or request any voluntary manslaughter instruction. Defense counsel explained: "I see this as an all or nothing kind of situation."

The court accordingly instructed the jury on first and second degree murder using CALCRIM Nos. 500, 520, and 521. In his closing argument, defense counsel asserted that Durant did not shoot Sheppard, and that the masked man was instead responsible. Counsel argued, "I am not going to spend a lot of time on explaining the law of homicide. Because I'm here to tell you he didn't do it, so I could care less whether the robber

committed first, second, whatever. Because I feel you don't get there until you've decided that it was [Durant] who was the shooter. And there's just not enough to go there."

2. Requirement for Instructions on Lesser Included Offenses

A trial court's duty to instruct on general principles of law extends to lesser included offenses. (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155.) The court has a sua sponte duty to instruct on a lesser included offense "if there is substantial evidence the defendant is guilty only of the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 118.) *If* there is such substantial evidence, the court must instruct on the lesser offense even where, as a matter of trial tactics, a defendant not only fails to request the instruction, but expressly objects to it being given, or the lesser included offense is inconsistent with the defendant's chosen defense. (*Breverman*, *supra*, 19 Cal.4th at pp. 154, 157, 162–163.)

As argued here, heat of passion voluntary manslaughter is a lesser included offense of murder. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) A defendant who unlawfully kills "upon a sudden quarrel or heat of passion" (§ 192, subd. (a)) lacks malice and is therefore guilty not of murder but of voluntary manslaughter. (See *People v. Moye* (2009) 47 Cal.4th 537, 549.)

The heat of passion theory has two components: (1) the accused's heat of passion must be due to *sufficient provocation by the victim* (or reasonably believed by the defendant to have been engaged in by the victim), such that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection; and (2) the accused must have killed while under the *actual influence of a strong passion* induced by such provocation. (*People v. Moye*, *supra*, 47 Cal.4th at pp. 549–550.) The question, therefore, is whether there was substantial evidence of these two components.

3. Analysis

The record discloses no substantial evidence that Durant killed Sheppard in a heat of passion induced by Sheppard's provocation. Durant did not claim at trial that he shot Sheppard spontaneously during an argument. He explicitly denied having any conflict or

disagreement with Sheppard before the shooting. According to his sworn testimony, Durant did not even shoot Sheppard.

In his briefing, Durant refers us to the raised voices that Perez heard – actually, Durant's voice – before the shooting, as well as the fact that the shooting occurred during a "game of chance" with "bets [] on the ground." But Perez did not testify what was said by Durant or any other participant in the conversation, so there was no evidence from which the jury could reasonably conclude what if anything Sheppard did to provoke Durant, let alone that it was something that would cause a reasonable person to act rashly. Accordingly, the court was not required to instruct on heat of passion. (See *People v. Chestra* (2017) 9 Cal.App.5th 1116, 1123 [court not required to instruct on heat of passion or self-defense, where there was no evidence in his confession or trial testimony (in which he denied shooting the victim) to support the instruction]; *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1021 [heat-of-passion and imperfect-self-defense voluntary manslaughter instructions not required, because once defendant denied he shot the decedent, none of the alleged evidence of heat of passion and imperfect self-defense was of the type a jury could find persuasive].)

B. Instruction on Self-Defense or Defense of Others

Durant next contends the court should have instructed sua sponte on perfect and imperfect self-defense or defense of others, based on his account of what occurred. We disagree.

1. Perfect and Imperfect Self-Defense

A person has engaged in "perfect" self-defense or defense of others, and is not guilty of homicide, if he kills someone with "an honest *and* reasonable belief in the need to defend" himself or others from great bodily injury or death. (*People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1227.) The person's honest belief negates the malice necessary to make the homicide murder, and the reasonableness of the belief renders the killing noncriminal. (*People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1269.) Because self-defense is a defense that precludes criminal liability altogether, the court must instruct sua sponte only if there is substantial evidence of the defense *and* the defense is

"not 'inconsistent with defendant's theory of the case.' " (*People v. Elize* (1999) 71 Cal.App.4th 605, 615; see *People v. Barton* (1995) 12 Cal.4th 186, 195.)

A person has engaged in "imperfect" self-defense or defense of others if he kills someone with an actual but *unreasonable* belief that he or someone else is in imminent danger of great bodily injury or death. (*People v. Simon* (2016) 1 Cal.5th 98, 132.) The person's actual belief negates the malice needed for murder, but because the belief was unreasonable, the homicide is still a crime but a lesser form of intentional homicide that lacks malice—namely, voluntary manslaughter. (*Ibid.*) Imperfect self-defense is therefore not a defense, but a lesser included offense. As such, trial courts must instruct on imperfect self-defense if there is substantial evidence the defendant is guilty of only voluntary manslaughter and not murder. (*People v. Birks, supra,* 19 Cal.4th at p. 118.)

2. Analysis

Durant fails to establish instructional error. In the first place, the trial court had no sua sponte duty to instruct on *perfect* self-defense or defense of others, since those theories were inconsistent with Durant's trial theory that Sheppard was shot by a masked robber, rather than by Durant. (*Elize, supra,* 71 Cal.4th at p. 615.)

Moreover, the court had no sua sponte duty to instruct on either perfect *or* imperfect self-defense (or defense of others), because there was no substantial evidence from which a reasonable jury could conclude that Durant shot and killed Sheppard in an honest belief that he needed to defend himself (or someone else).

Durant insists there was such evidence, pointing to his testimony that he struggled with the shooter after the shooter started firing at Sheppard. Durant testified as follows: "At first I kind of, you know, turned my head (indicating) because of the flash and the loud noise. But as I looked up and I seen [Sheppard] falling again, I looked at the shooter, and he was still moving the gun around (indicating), and I just reacted. I jumped up and tussled with him." He continued: "As I seen his arm moving the gun around, I went for the gun. I jumped up, sprang forward, grabbed his arm. We were tussling, the gun is going off, bang, bang, bang, bang, bang, bang, bang, bang, bang, bang. While I'm making sure he doesn't try to shoot me, we're tussling back and forth. We're moving

more towards the laundry room door, and we trip in front of the laundry room and hit the floor."

In substance, Durant claimed that the masked shooter shot Sheppard to the point that Sheppard fell "again," and *then* Durant struggled for the gun, and the gun continued to go off. Durant did *not* testify that he obtained possession of the gun or that he was ever the one doing the shooting or otherwise causing any bullets to strike Sheppard. Nor did he provide evidence that any such bullets could have caused Sheppard's death. Thus, even if a jury would believe Durant's testimony, there was no substantial evidence from which the jury could reasonably conclude that Durant killed Sheppard in defending Sheppard or himself.

C. Instruction on Accomplice Testimony

Durant further contends the court erred in failing to instruct the jury with CALCRIM No. 334, which provides that a jury may not convict based on uncorroborated accomplice testimony. More specifically, CALCRIM No. 334 requires the jury to decide whether a specified witness was an accomplice to the charged crime, in that the witness was subject to prosecution for that crime by either (1) personally committing it or (2) knowing of the defendant's criminal purpose and intentionally aiding, facilitating, promoting, encouraging, or instigating the crime's commission. If the jury decides the witness was an accomplice, CALCRIM No. 334 admonishes the jury not to convict the defendant based on the witness's testimony alone. (See also § 1111.) This instruction was necessary, Durant urges, because Joubert and Mason were actually his accomplices.

Durant's argument is meritless. In the first place, the evidence was insufficient as a matter of law to find that Joubert and Mason were accomplices to Sheppard's murder. (*People v. Horton* (1995) 11 Cal.4th 1068, 1114 [no instruction on accomplice testimony needed if evidence insufficient as a matter of law].) There is no evidence that Joubert or Mason shot Sheppard. Nor is there any evidence that they knew Durant was going to kill Sheppard or that they aided, facilitated, promoted, encouraged or instigated the shooting.

Durant insists the circumstantial evidence that subjected Durant to conviction also subjected Joubert and Mason to conviction, because there was physical evidence

(discarded phones and marijuana) suggesting Durant was not the only person with Sheppard when he was shot, and Joubert and Mason's flight after the shooting and statements to the police – which Durant claims were false – led to an inference of guilt. The argument is untenable. Even if Joubert and Mason were at the dice game, ran from the scene, and were disingenuous about why they left their belongings behind, there was still no evidence they took part in shooting Sheppard.

Furthermore, Durant fails to establish that the absence of the accomplice instruction was prejudicial. He does not identify what evidence Joubert and Mason presented that pointed to Durant's guilt but would *not* have been found by the jury to be corroborated. Nor does he show any reasonable probability that he would have obtained a more favorable outcome if the jury had not considered that evidence. (See *People v. Whisenhunt* (2008) 44 Cal.4th 174, 214 [asserted error in omitting an instruction based on § 1111 is subject to reasonable probability standard of harmless error].)

D. Prosecutor's Inquiry About Rumors "On the Street" as a Possible Motive

Durant next contends the court erred by allowing the prosecutor to ask Mason questions about a possible "beef" between Durant and Sheppard. He urges there was no foundation for this purported rumor, the questions called for hearsay, the information was not relevant, and the inquiry was directed at Durant's character. His arguments are unavailing.

1. Background

During the prosecutor's and defense counsel's examinations of Mason, there were recurring inquiries about Mason's reluctance to testify, Durant's aggressiveness, and an apparent pre-existing dispute between Durant and Sheppard, culminating in two questions of which Durant now complains. For context, we begin with the antecedent testimony.

During cross-examination by Durant's counsel, Mason testified that he was reluctant to testify because he was afraid, although not of Durant. He acknowledged that if he was seen in the community talking to police, he could be killed. Durant's attorney eventually asked, "[A]re you under fear of being killed if you say there was a robber,

because that robber would still be out there; isn't that true?" Mason replied, "If that's the case then, yeah."

During redirect, the prosecutor asked Mason if he had described Durant as "aggressive" and had admitted as much at the preliminary examination: " 'He is aggressive all the time.' All the time. Those are your words." Mason agreed that is how the transcript read. On recross, Durant's attorney asked Mason about his use of the term "aggressive," and queried if Durant and Sheppard were friendly on the day of the shooting or if there was any animosity or tension between them: "Q. No animosity, no tension, nothing going on on that day October 6, 2015 correct? [¶] A. No. [¶] Q. In fact, it is a complete shock to you that [Durant] is sitting here right now; isn't it? [¶] A. Yes."

On further redirect, the prosecutor asked the questions Durant challenges here: "Q. Mr. Arroyo [defense counsel] asked you about rumors. Have you heard *rumors* about a beef between [Sheppard] and [Durant]? [¶] A. No. [¶] Q. Have you heard *anything on the street*? [¶] [Defense Counsel]: Objection. [¶] THE COURT: Overruled. [¶] Q. About their [sic] being uneasiness about a debt? [¶] A. No." (Italics added.) The examination then ended.[4]

2. Analysis

Defense counsel's only challenge at trial to the prosecutor's questions was an unspecific objection to the query, "Have you heard anything on the street?" Because defense counsel did not identify any particular ground for the objection, the objection was neither properly asserted in the trial court nor preserved for review. (Evid. Code, § 353, subd. (a).) And because Mason ultimately responded to the question with "no," the question did not result in any evidence prejudicial to Durant. Nor was the prosecutor's

[4] The parties do not cite to a portion of the record where Durant's trial counsel had asked Mason about "rumors." However, Durant's trial counsel had asked *Joubert* if his testimony – that he was unaware of any robbery of the dice game the night of Sheppard's killing – was based on "your personal knowledge or you're not here to testify about *rumors* or what the street is talking about?" (Italics added.)

question so evocative or inflammatory that the question itself caused undue prejudice despite Mason's denial. (See Evid. Code, § 353, subd. (b).)

Durant now specifies that the prosecutor's inquiries about rumors and information "on the street" were irrelevant. His argument is not only untimely, but unpersuasive. Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action," including motive. (Evid. Code, § 210; *People v. Carter* (2005) 36 Cal.4th 1114, 1166.) Here, the prosecutor's questions about Mason's awareness of any "beef" between Durant and Sheppard before the shooting was relevant to Durant's potential motive for the crime.

Durant further contends the only support for the idea that there was a long-standing dispute between Durant and Sheppard comes from outside the record. He is incorrect. Before Mason took the stand, Joubert testified that he was surprised to see Durant with Sheppard because they had "a little altercation" in the past. While Joubert minimized the altercation's significance and thought Durant and Sheppard were "cool," the prosecutor was free to explore with Mason the possibility that, unbeknownst to Joubert, the prior altercation had led to Durant's ill-will towards Sheppard.

Durant also states in his appellate briefs that the prosecutor's questions lacked foundation, called for hearsay, and targeted Durant's character, but he provides no substantial argument to support these propositions. He does not explain his reference to a lack of "foundation," but certainly Mason had personal knowledge as to whether he had heard something. As to hearsay, the prosecutor asked Mason *if* he had heard something on the street, and when Mason replied "no," the inquiry ended and no inadmissible hearsay was admitted. Nor did the prosecutor's questions seek impermissible character evidence, since they were designed to elicit Durant's motive for killing Sheppard. (Evid. Code, § 1101, subd. (b).) Durant fails to establish error.[5]

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[5] We also observe that the prosecutor's questions, in context, were harmless. The prosecutor asked one question about Mason hearing any rumor about a "beef" between Sheppard and Durant, and Mason said "no." The prosecutor asked one question about whether he had heard anything on the street about uneasiness over a debt, and Mason said

E. Prosecutorial Misconduct

A prosecutor's conduct " ' " ' violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " ' " (*People v. Navarette* (2003) 30 Cal.4th 458, 506.) Under state law, a prosecutor's conduct may constitute prosecutorial error "only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " (*Ibid*.)

Durant contends he was deprived of a fair trial because the prosecutor referred to uncharged misconduct and facts outside the record, expressed his personal belief, and appealed to the jury's sympathy and passion. We address each of his five categories of claimed prosecutorial misconduct and find no misconduct or error.

1. Violation of Court Rulings

Durant's trial attorney moved in limine to prohibit "any mention of any uncharged criminal conduct or bad acts by defendant," noting that Durant had a past conviction. He also requested that any objection to evidence made during his motions in limine be deemed a "continuing objection at trial." The court ordered the prosecutor to give notice before introducing evidence of Durant's uncharged crimes or bad acts so the court could then rule on its admissibility, and allowed Durant's objection to be a continuing one.

Durant now contends the prosecutor violated this order by asking witnesses about "threats" and the word "on the street" regarding Durant's character for aggressiveness. He does not cite the specific questions he is challenging or identify where he objected to any question on the ground the prosecutor had not provided required notice. His claim is therefore not preserved for appeal. (Evid. Code, § 353; *People v. Price* (1991) 1 Cal.4th 324, 447.)

In any event, Durant's contention fails on the merits. As to the prosecutor's

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"no." The questioning was minimal. And contrary to Durant's assertion, this questioning was not what allowed the prosecutor to pursue a theme that Durant had motive to kill Sheppard due to an ongoing dispute; if anything, Mason's answers to the prosecutor's questions rebuffed the prosecutor's theory on this point.

questions about the word on the street or Durant's aggressiveness, the inquiries did not pertain to any uncharged crime or prior bad act, so they were not subject to the in limine order requiring advance notice.

As to the prosecutor asking witnesses about "threats," the in limine order may have pertained (even though the in limine discussion was only about prior convictions or arrests): dissuading a witness from testifying is a crime (§ 136.1), and one might infer from witnesses being afraid to testify against Durant that the threats had been made by Durant or at his behest. But even so, Durant does not show he is entitled to relief. As discussed *post*, the prosecutor's questions and references to threats were permissible, so the court would have reasonably allowed them even if notice had been provided. Moreover, Durant's trial attorney had ample opportunity to cross-examine the witnesses about the alleged threats, defense counsel in fact seized upon that opportunity, and the witnesses *denied* that they were threatened or afraid of Durant. Durant fails to establish he was prejudiced by any violation of the in limine order.

2. Questioning About Rumors on the Street

For his next salvo, Durant refers us again to the following part of the prosecutor's examination of Mason: "Q. [Defense counsel] asked you about rumors. Have you heard rumors about a beef between [Sheppard] and [Durant]? [¶] A. No. [¶] Q. Have you heard anything on the street? [¶] [Defense Counsel]: Objection. [¶] THE COURT: Overruled. [¶] . . .[¶] Q. About their [sic] being uneasiness about a debt? [¶] A. No."

Durant argues that the "uneasiness about a debt" suggested by the prosecutor was not supported by evidence at trial and was not the subject of a section 402 hearing on admissibility. He also states it is improper for a prosecutor to ask questions of a witness that suggest facts adverse to a defendant, absent a good faith belief that such facts exist. (See *People v. Warren* (1988) 45 Cal.3d 471, 481–482; *People v. Perez* (1962) 58 Cal.2d 229, 240–241.)

Durant's arguments are unavailing. First, Durant did not object to the prosecutor's question on the ground of prosecutorial misconduct. His challenge is therefore not preserved for appeal.

Second, contrary to Durant's assertion, the prosecutor's question *was* supported by evidence at trial. Before Mason took the stand, Joubert testified that there had been a prior altercation between Durant and Sheppard. The prosecutor was entitled to ask Mason about this altercation, including the resulting relationship between Durant and Sheppard. (See *People v. Stanley* (2006) 39 Cal.4th 913, 951.) In so doing, it was not impermissible for the prosecutor to ask whether there was uneasiness about a debt: the jury would likely take this as an inquiry into whether the altercation had involved a debt – as altercations often do – as opposed to some secret information known to the prosecutor. There is no indication the prosecutor lacked a good faith basis for the question.

Finally, although Durant claims a section 402 hearing should have been held, he did not request one. And the absence of such a hearing was not prejudicial, since there is no indication a hearing would have or should have resulted in a bar of the prosecutor's question.

3. References to Threats

Evidence of a witness's fear, including fear of retaliation for testifying, is admissible to evaluate the witness's credibility. " 'Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible. [Citation.] It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible.' " (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.)

Nonetheless, Durant argues that the prosecutor's statements and queries about the fear of Perez, Joubert, and Mason constituted misconduct. They did not.[6]

a. Insinuation of Threats Against Perez

In opening statement, the prosecutor asserted that Perez "received *threats* for telling the police exactly what I've told you [about the shooting]." (Italics added.) In

[6] Durant did not object at trial to any of the statements or questions he challenges now. However, since the trial court deemed Durant to be making a continuing objection to matters to which he objected in limine, including uncharged crimes and bad acts, we will proceed to the merits.

direct examination of Perez, the prosecutor elicited testimony that she had moved from her home at 1611 Russell Street because she "didn't feel safe." On cross-examination, however, Perez denied that she had received any threats, but also testified that cooperating with the police could be dangerous.

Durant fails to establish prosecutorial misconduct. As it turned out, Perez did not admit at trial that she had been threatened, but there is no indication in the record that the prosecutor, at the time of opening statement, lacked a good faith belief that Perez would either admit receiving threats or admit facts from which the jury could reasonably infer that threats occurred.

b. Insinuation of Threats Against Joubert

During direct examination, the prosecutor asked Joubert whether he had received threats: "Q. . . . And the truth is you have been receiving threats, correct? [¶] A. I plead the fifth. [¶] Q. You can't plead the fifth. [¶] A. I don't want to talk about it. [¶] THE COURT: Well, you answer the question. You can answer the question. [¶] No, that ain't true." After Joubert's denial, the prosecutor asked him about a conversation they had previously: "Q. And I told you there were certain things I wasn't going to ask you and there was certain things I was, correct? [¶] A. Right. [¶] Q. You were concerned for your safety; isn't that true? [¶] A. Right. [¶] Q. In fact you told me of at least six incidents where you – [¶] A. Incidents ain't got nothing to do with this. I told you yesterday, sir. I made that clear to you." Then the prosecutor asked whether Joubert was reticent to answer questions at trial because of people in the courtroom: "Q. You notice we have an audience behind us, correct? [¶] A. Right. [¶] Q. Is the reason why you don't want to answer these questions because of the audience? [¶] A. No. I'm being a hundred percent real with you. . . ."

Durant contends the prosecutor's questions about their prior conversation was improper, contending it is "misconduct 'to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness.' " (*People v. Bonilla* (2007) 41 Cal.4th 313, 336; see *People v. Hill* (1998) 17 Cal.4th 800, 827–828.)

The argument is meritless. The prosecutor asked Joubert *if* an out-of-court conversation occurred, and Joubert said it did. The prosecutor was not suggesting he possessed knowledge unavailable to the jury; to the contrary, he was *presenting* evidence to the jury. Nor was the prosecutor using the prior conversation to corroborate a witness's testimony: rather, he was using it to *challenge* Joubert's testimony up to that point. The cases on which Durant relies are plainly distinguishable. (*Hill, supra*, 17 Cal.4th at p. 828 [prosecutor committed misconduct by suggesting, without factual support in the record, that violent crime in the area decreased after defendant was arrested]; *People v. Newman* (1931) 113 Cal.App. 679, 684 [misconduct to argue, without supporting facts, that the number of arson fires in the county were significantly reduced when the defendant, charged with arson, was placed in custody].)

Durant also points out that the prosecutor made the following reference to Joubert's testimony during closing argument: "He [Joubert] had information from the streets that there was a beef between Anthony Durant and Christian Shepperd, and wondered why were these two together." The prosecutor's argument was not misconduct. Joubert testified, in fact, that Durant and Sheppard had a prior altercation and he was surprised they were together. That Durant and Sheppard had a "beef" was thus a reasonable argument for the jury to consider, along with the testimony that Mason said he had not heard about any "beef" and Joubert said they were "cool." A prosecutor has "wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence." (*People v. Dykes* (2009) 46 Cal.4th 731, 768.) There is no reasonable likelihood the jury construed or applied the remark in an objectionable manner. (See *People v. Morales* (2001) 25 Cal.4th 34, 44.)

c. Insinuation of Threats Against Mason

On direct examination, Mason expressed fear about testifying at Durant's trial. During cross-examination, Durant's attorney suggested that Mason's fear was not of

Durant, but of the robber. The prosecutor asked Mason on redirect about his earlier statement that Durant was "aggressive." We see no misconduct by the prosecutor.

Durant contends it is inappropriate for a prosecutor to suggest that a witness's subjective fears are real, because it constitutes "vouching." However, he provides no citation to the record where this occurred.

In his reply brief, Durant emphasizes that the witnesses testified that they were not threatened (at least not by Durant). The fact that the witnesses denied being threatened does not mean, as Durant suggests, that the prosecutor lacked a good faith basis for asking them if they were.

4. Personal Belief as to Durant's Guilt

As another allegation of prosecutorial misconduct, Durant contends the prosecutor injected his personal opinion as to Durant's guilt during Joubert's testimony, by referring to Durant as "the person I believe or the State believes committed that crime." Durant insists that the prosecutor's purpose was to vouch for the charges, and he urges that this expression of "the State's" opinion was improper. (Citing *People v. Criscione* (1981) 125 Cal.App.3d 275, 293; see *People v. Frye* (1998) 18 Cal.4th 894, 971.) Durant's argument is utterly meritless.

First, Durant did not object to the prosecutor's question or request a curative admonition. Accordingly, his challenge is not preserved for appeal.

Second, Durant miscasts the record. After Joubert testified that the prosecutor had called him as a witness regarding something in which Joubert was not involved, the subject colloquy ensued: "Q. The reason why I brought you into this was because a friend of yours was murdered. [¶] A. Right. [¶] Q. And it's my job to prosecute the person I believe or the State believes committed that crime, correct? [¶] A. Right. [¶] Q. And one of the things that I told you was that I am sensitive to what you are going through, correct? [¶] A. Right." In context, the prosecutor was not vouching for the charges, but getting the witness to recognize that it was his responsibility to prosecute the defendant notwithstanding Joubert's discomfort in testifying. A prosecutor may properly comment on the prosecutor's function in the criminal justice system. (See *People v.*

Houghton (1963) 212 Cal.App.2d 864, 871 [rejecting misconduct claim where prosecutor said, " 'Certainly as a prosecutor it is my job to enforce the law where the law has been violated and I have the man who did it, but not to play games to get a conviction of somebody whose guilt is not proved by evidence' "].)

Third, there is no reasonable likelihood the jury understood or applied the prosecutor's words in an improper or erroneous manner. (See *Dykes*, *supra*, 46 Cal.4th at pp. 771–772 [" 'courts "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements' "].) Certainly the jury would not be shocked or distracted by the unremarkable fact that the prosecutor believed the defendant he was prosecuting committed the charged crimes.

5. Question About Sheppard's Mother: "She Thinks You Killed Her Son"

It is improper for a prosecutor to appeal to a jury's sympathy. (*People v. Fields* (1983) 35 Cal.3d 329, 362.) Nor may a prosecutor make arguments to the jury that create an impression that " ' "emotion may reign over reason," ' " and to present " ' "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." ' " (*People v. Linton* (2013) 56 Cal.4th 1146, 1210.) Durant contends the prosecutor did just that by asking him on cross-examination: "She [the victim's mother] thinks you killed her son. Do you realize that?"

Again, Durant did not object to the prosecutor's question at trial, so his challenge has been forfeited. And again, Durant ignores the context of the prosecutor's question, which shows that there was no prosecutorial misconduct.

On direct examination, Durant denied responsibility for the shooting and claimed that Sheppard was killed by a masked robber. On cross-examination, the prosecutor tested the veracity of this assertion by, among other things, asking if he had ever contacted Sheppard's mother to tell her his new version of what happened. Durant said he had not, despite being long-time friends with Sheppard. It was then that the prosecutor asked, "She thinks you killed her son. Do you realize that?" Durant responded, "I realize that now." The prosecutor next asked, "Why wouldn't you try to get in touch with her to tell her that a robber killed her son?" Durant claimed he "didn't know what to do when

[he] got home." The prosecutor's question was plainly not an appeal to sympathy or emotion, and the jury would not have seen it as such. Certainly prosecutors may question a testifying defendant and challenge his or her factual assertions. (*People v. Lang* (1989) 49 Cal.3d 991, 1017.)

In sum, there was no prosecutorial error or misconduct.[7]

F. Remand for Resentencing Under Senate Bill No. 620

The court imposed a 25-years-to-life sentence enhancement under section 12022.53, subdivision (b), based on the jury's finding that Durant had personally used a firearm. Durant contends the case should be remanded to the trial court for consideration in light of Senate Bill No. 620 (Stats. 2017, ch. 682), which grants trial courts discretion to strike firearm enhancements under section 12022.53. Respondent agrees. In light of their stipulation, we will remand for that purpose.

G. On Remand, Durant May Make a Record for a Youth Offender Parole Hearing

At the time of his sentencing, section 3051 provided for youth offender parole hearings for certain individuals 23 years or younger at the time of their offense. Durant was 24 years old on the date of Sheppard's murder. Not subject to section 3051, Durant was given a 40-year to life term for the murder and personal use of a firearm.

After the trial in this case, section 3051 was amended to extend youth offender parole hearing eligibility to persons who were 23, 24, and 25 years old at the time of the

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[7] Durant contends his trial attorney's failure to object to each of the now-claimed instances of prosecutorial misconduct does not preclude our review, because "counsel did not want to amplify the sound of the bell which had already rung and prior objections along such lines had failed." (See *People v. Cole* (2004) 33 Cal.4th 1158, 1201 [defendant excused from making timely objection and request for admonition if they would have been futile or an admonition would not have cured the harm].) He also contends that, if his trial attorney's failure to object did forfeit appellate review, his attorney rendered ineffective assistance of counsel. His arguments are unavailing, since we have reviewed his challenges on the merits despite counsel's failure to object. We also note his ineffective assistance claim would be precluded because he asserts that his counsel chose not to object due to his trial strategy. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1259–1260; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 688–690, 694.)

offense. (Assem. Bill No. 1308 (2017–2018 Reg. Sess.) § 1 (Stats. 2017, ch. 765); see § 3051 (eff. January 1, 2018).)

Durant requests a limited remand so he can make a record for a future youth offender parole hearing, as contemplated by *People v. Franklin* (2016) 63 Cal.4th 261. Respondent agrees that, under the logic of *People v. Perez* (2016) 3 Cal.App.5th 612 – which ordered a remand when the eligibility age was raised for youth offender parole hearings – the requested remand is appropriate. Our remand will be for that purpose as well.

H. The Sentence for Unlawful Firearm Possession Must Be Stayed

Durant contends the court erred in imposing a concurrent two-year term for his count-two firearm possession conviction (§ 29820, subd. (b)) rather than staying the term under section 654. Again, respondent agrees. "[W]here the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense." (*People v. Bradford* (1976) 17 Cal.3d 8, 22.) Respondent concludes that Durant's firearm possession was incidental to and not separate from the primary offense of murder. As a result, the firearm possession sentence must be stayed. We will so order.

III. DISPOSITION

The matter is remanded to the trial court (1) for the court to exercise its discretion in deciding whether to strike the firearm enhancement under Penal Code section 12022.53, and if so, to resentence appellant accordingly; (2) to allow appellant to make a record for a future youth offender parole hearing as provided in Penal Code section 3051; and (3) for the court to stay its sentence as to the conviction for unlawful firearm possession (Pen. Code, § 29820, subd. (b)). In all other respects, the judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BURNS, J.

(A151338)